Supreme Court, U.S.
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No. 87-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In re KENDAVIS HOLDING COMPANY AND KENDAVIS INDUSTRIES INTERNATIONAL, INC.,

Debtors

K. W. DAVIS, JR., ALANA LAWLER, ALANA LAWLER TRUST "A", A. T. DAVIS, A. T. DAVIS TRUST "A", KAY DAVIS, KAY DAVIS TRUST "A", TRICIA KAE LAWLER, ALANA LAWLER CHILDREN'S TRUST, ALLEN KENNETH DAVIS, JANIECE BREANNE DAVIS, A. T. DAVIS CHILDREN'S TRUST, KAY DAVIS CHILDREN'S TRUST, T. C. DAVIS, II, T. C. DAVIS, II TRUST, T. C. DAVIS, II TRUST "A", T. C. DAVIS, II TRUST "A" DATED JANUARY 15, 1982, BRIAN KEITH DAVIS, BRIAN KEITH DAVIS TRUST, BRIAN KEITH DAVIS TRUST "A", BRIAN KEITH DAVIS TRUST DATED JANUARY 15, 1982, CHESLEY DAVIS, CHESLEY DAVIS TRUST, TREY DAVIS, TREY DAVIS TRUST, KEN W. DAVIS FOUNDATION, AND TWALLA DUPRIEST, TRUSTEE FOR ESTATE OF T. C. DAVIS,

Petitioners

v.

THE OFFICIAL UNSECURED CREDITORS' COMMITTEES FOR KENDAVIS HOLDING COMPANY, KENDAVIS INDUSTRIES INTERNATIONAL, INC. AND LOFFLAND BROTHERS COMPANY, KENDAVIS HOLDING COMPANY, FEDERAL DEPOSIT INSURANCE CORPORATION, THE BANK OF NOVA SCOTIA, AND MBANK HOUSTON, N.A.,

Respondents

RESPONDENT OFFICIAL UNSECURED CREDITORS' COMMITTEES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

On November 24, 1986, a United States bankruptcy judge entered an order confirming a plan of reorganization for two corporate debtors proposed by the official unsecured creditors' committees under chapter 11 of title 11 of the United States Code. Four months later and while appeals were pending in the United States district court, the bankruptcy judge disclosed that he had the night before discovered, for the first time, that J. P. Morgan & Co., Inc., a company in which he held stock, owned Morgan Guaranty Trust Company of New York, one of the creditors in the Kendavis related bankruptcy cases over which the judge was then presiding. The bankruptcy judge immediately recused himself pursuant to 28 U.S.C. § 455(b)(4). The district court affirmed the orders of the bankruptcy judge and dismissed the appeal of the respondent committees' plan of reorganization. Thereafter, Petitioners filed a motion to vacate the confirmation order based on the recusal of the bankruptcy judge. The district court denied Petitioners' motion to vacate, concluding that the bankruptcy judge had fully complied with the provisions of § 455. The United States Court of Appeals for the Fifth Circuit affirmed the orders of the bankruptcy court and district court below.

The questions presented are:

1. Whether the requirements of 28 U.S.C. § 455(b)(4) are satisfied when a bankruptcy judge voluntarily recuses himself immediately upon learning that he holds a financial interest in the corporate parent of a creditor in a bankruptcy proceeding pending before him.

2. Whether a bankruptcy judge's impartiality can reasonably be questioned within the meaning of 28 U.S.C. § 455(a) when he voluntarily recuses himself immediately upon acquiring actual knowledge of his financial interest in the corporate parent of a creditor in a bankruptcy proceeding pending before him.

3. Whether Petitioners, who lack standing to raise any other issue on appeal, nonetheless have standing to petition this Court for a writ of certiorari to review confirmation orders based on the disqualification of a bankruptcy judge under 11 U.S.C. § 455.

4. Whether a confirmation order that has been substantially consummated renders the appeal of such order moot.

PARTIES TO PROCEEDING BELOW

In addition to the parties named in the caption of this case, the following were made parties to the proceeding in the Fifth Circuit:

The Bank of New York
The Chase Manhattan Bank, N.A.
CS&S Liquidating Co. (formerly, Cummins Sales & Service, Inc.)
Consolidated Asset Management as Administrator for Federal Deposit Insurance Corporation, in its corporate capacity (formerly, First National Bank & Trust Company of Oklahoma City)
Credit Commercial De France, New York Branch
Den Norske Creditbank
Development Bank of Singapore Limited
First City National Bank of Fort Worth
First City National Bank of Houston
First Interstate Bank of California
First RepublicBank Dallas, N.A. (formerly, InterFirst Bank Dallas, N.A.)
First RepublicBank Fort Worth, N.A. (formerly, InterFirst Bank Fort Worth, N.A.)
Frigette Corporation
Geodril, Inc.
Globe Machinery and Supply Company
Harrisburg, Inc.
Hydril Company
Irving Trust Company
Kendavis Industrial Supply Co.
Loffland Brothers Company
Loffland Brothers Eastern Hemisphere, Inc.
Loffland Brothers (Singapore) Pte., Ltd.
Mechanical Rubber Products Corporation
Miami-Dickerson Steel Company
Midco Equipment Co.
Mid-Continent Supply Co.
Moore & Sons, Inc.
Morgan Guaranty Trust Company of New York
The National Commercial Bank of Saudi Arabia
Nippon Kokan Kabushiki Kaisha
Rig-A-Lite Company, Inc.
Security Pacific National Bank
Sligo, Inc.
State Pipe & Supply Co.
Texas American Bank-Fort Worth, N.A.
Unit Rig & Equipment Co.

Further, pursuant to request of the Clerk of the United States Court of Appeals for the Fifth Circuit, the undersigned previously submitted a list of all of the pre-petition creditors in the Kendavis related cases. There were approximately 10,835 creditors on the list that was furnished to the Fifth Circuit. If this Court so directs, the undersigned will submit an identical list of creditors to this Court.

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No. 87-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

K. W. DAVIS, JR., et al.,

Petitioners

v.

OFFICIAL UNSECURED CREDITORS' COMMITTEES, et al.,

Respondents

RESPONDENT OFFICIAL UNSECURED CREDITORS' COMMITTEES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Official Unsecured Creditors' Committees of Kendavis Holding Company ("KHC"), Kendavis Industries International, Inc. ("KIII") and Loffland Brothers Company ("Loffland") (the "Respondent Committees")[1] respectfully pray that the Court deny the petition for writ of certiorari.

[1] The members of the KHC creditors' committee are Security Pacific National Bank, The Bank of Nova Scotia, Morgan Guaranty Trust Company of New York, Continental Illinois National Bank and Trust Company of Chicago as Administrator for Federal Deposit Insurance Corporation, The Bank of New York, MBank Houston, N.A., First Interstate Bank of California, Irving Trust Company, The Chase Manhattan Bank, N.A., First City National Bank of Houston and Credit Commercial de France, New York Branch. Membership of the KIII creditors' committee is identical to the membership of the KHC creditors' committee, except that Consolidated Asset Management Company as Administrator for Federal Deposit Insurance Corporation, in its Corporate Capacity (formerly, First National Bank & Trust Company of Oklahoma City) is a member of the KIII and Loffland committees only. Membership of the Loffland creditors' committee is identical to the membership of the KIII creditors' committee, except that Hydril Company is a member of the Loffland creditors' committee only.

REASONS FOR NOT GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Fifth Circuit is in accordance with legal precedent from other circuits.

2. The decision of the United States Court of Appeals for the Fifth Circuit presents no novel legal analysis warranting this Court's review.

3. The United States Court of Appeals for the Fifth Circuit limited its decision to the specific facts of this case.

4. The district court and the United States Court of Appeals for the Fifth Circuit correctly found that the bankruptcy judge complied with the requirements of 28 U.S.C. § 455(b)(4) when he voluntarily recused himself immediately upon acquiring actual knowledge of his indirect financial interest in one of the creditors in a bankruptcy proceeding pending before him.

5. The district court and the United States Court of Appeals for the Fifth Circuit correctly found that the bankruptcy judge complied with the requirements of 28 U.S.C. § 455(a).

6. The district court correctly found that Petitioners lack standing to appeal, and thus Petitioners lack standing to seek a writ of certiorari.

7. The Respondent Committees' plan of reorganization has been substantially consummated and Petitioners' appeal is therefore moot.

STATEMENT OF THE CASE

This petition relates to orders of the United States Bankruptcy Court for the Northern District of Texas, the Honorable Robert C. McGuire presiding (the "Bankruptcy Court"), confirming the Respondent Committees' Modified Joint Plan of Reorganization (the "Committees' Plan") as to KIII and KHC, and denying confirmation of the Debtors' Third Amended Joint Plan of Reorganization ("Debtors' Plan").[2] On March 26, 1987, those orders were affirmed by the United States District Court for the Northern District of Texas, Dallas Division, the Honorable A. Joe Fish presiding (the "District Court"). R.App.-10. On September 24, 1987, the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") affirmed the District Court decision. Pet.App.-6.

The chapter 11 cases of KIII and KHC commenced on February 21, 1985 when eight unsecured institutional creditors that were owed in excess of $440 million, filed involuntary petitions for relief.[3] KIII and KHC consented to the filings and orders for relief were entered on March 19, 1985. KHC and KIII were insolvent at the commencement of their cases, and their insolvency throughout the proceedings was not disputed by any party during the course of the confirmation hearings or on appeal of either the Debtors' Plan or the Committees' Plan. At no time during the course of the hearings on the Committees' Plan did Petitioners ever file an objection to the Committees' Plan or appear in opposition to its confirmation.

Hearings on the competing Debtors' Plan and the Committees' Plan lasted from May 7, 1986 until June 24, 1986, and

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[2] The proponents of the Debtors' Plan were KHC, KIII, Loffland, Loffland Brothers Eastern Hemisphere, Inc., Loffland Brothers (Singapore) Pte., Ltd., Mid-Continent Supply Co. and Geodril, Inc. (collectively, the "Debtors"). At the time that the Debtors' Plan was proposed, the Petitioners managed and controlled each of the Debtors.

[3] KIII and KHC owed approximately $500 million in aggregate institutional debt. Noninstitutional debt was less than one percent (1%) of KIII's and KHC's debt.

from June 25, 1986 until November 12, 1986, respectively. The Bankruptcy Court's confirmation of the Committees' Plan and denial of the Debtors' Plan was a carefully studied, well informed decision by Judge McGuire, based upon a voluminous record.

On March 22, 1987, approximately four months after entry of the order confirming the Committees' Plan, Judge McGuire learned, for the first time, that a company in which he held stock, J.P. Morgan & Co., Inc. ("J.P. Morgan"), is the parent company of one of the bank creditors in these cases, Morgan Guaranty Trust Company of New York ("Morgan Guaranty"). On March 23, 1987, Judge McGuire advised the parties' counsel by telephone conference call that while reading *The Value Line Investment Survey ("Value Line")* the night before, he discovered for the very first time that J.P. Morgan owned Morgan Guaranty. Pet.App.-19. During this same conference, Judge McGuire stated that in response to an inquiry he made to his stock broker early in the proceedings, he recalled being informed that J.P. Morgan and Morgan Guaranty were unconnected entities. *Id.* According to Judge McGuire, the late discovery came "out of the blue." Pet.App.-20. Judge McGuire's holding is a miniscule percentage of the outstanding stock of J.P. Morgan, and the amounts owed to Morgan Guaranty in these cases are a similarly tiny fraction of that bank's assets. Thus, these cases do not have any impact upon Judge McGuire's finances. Nonetheless, as required by 28 U.S.C. § 455, Judge McGuire immediately advised the parties of his holding, and recused himself from hearing the case without taking any further action in the proceedings. Pet.App.-7, 14, 18.

On March 26, 1987, the District Court entered various orders and judgments affirming the Bankruptcy Court orders. The District Court concluded, in part, that Petitioners herein "are not aggrieved persons and have no standing to appeal." R.App.-4. On March 31, 1987, Petitioners filed in the District

Court motions pursuant to Fed. R. Civ. P. 60(b)(4) and (6) to vacate the confirmation orders, based upon the circumstances of Judge McGuire's recusal. In these motions, there were no allegations of actual bias, partiality or impropriety on the part of Judge McGuire, and no affidavits of any kind to that effect were filed. On April 10, 1987, the District Court denied the motions to vacate on their merits.[4] Pet.App.-11. Although again concluding that Petitioners arguably lacked standing to seek a retrospective recusal, the District Court also ruled on the merits that there was no violation of 28 U.S.C. § 455(b)(4), no "constructive knowledge" on the part of Judge McGuire and no basis for reasonably doubting the bankruptcy judge's impartiality within the meaning of 28 U.S.C. § 455(a). *Id.* The District Court also stated that no due process violation resulted from the unknown, insubstantial interest. *Id.*

Upon review by the Fifth Circuit, the court of appeals held that all but one of the many points of error asserted by Petitioners were "frivolous." Pet.App.-7. On the remaining issue of judicial disqualification, the court of appeals held that under the specific circumstances of this case, the District Court "was entitled to accept the bankruptcy judge's statement of his lack of knowledge that the corporation in which he held stock was the corporate parent of a creditor of the . . . debtor and might be affected by the outcome of the proceeding." Pet.App.-7. The Fifth Circuit found that the record did not justify questioning Judge McGuire's assurance. *Id.* Furthermore, the Fifth Circuit found "it clear that Judge McGuire's impartiality could not reasonably be questioned." *Id.* Thus, both the District Court and the Fifth Circuit properly concluded that based upon the specific facts of this case, Judge McGuire had fully complied with the provisions of 28 U.S.C. § 455. Because the Fifth Circuit found that neither § 455(b)(4) nor 455(a)

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[4] The District Court deemed Petitioners' motion to vacate to have been brought under Fed. R. Civ. P. 59, citing *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.) (en banc), *cert. denied*, 107 S. Ct. 398 (1986). Pet.App.-12 n.1.

was violated, the court of appeals was not required to determine whether a violation of § 455 requires only prospective recusal or whether, and under what circumstances, retroactive relief is appropriate.

Under the self executing terms of the Committees' Plan, its "effective date" occurred on April 16, 1987. Petitioners failed to seek a stay of the implementation of the Committees' Plan. The District Court denied two separate stay motions that were filed only by the Debtors and other corporate appellants, and the Fifth Circuit denied an emergency stay motion, again, filed only by the Debtors and other corporate appellants. Consequently, on April 16, 1987, pursuant to the terms of the Committees' Plan, all of the prior capital stock of KHC held by Petitioners was cancelled. KIII was statutorily merged into KHC, a new board of directors and chief executive officer were installed, and new capital stock was issued to the Class 7 creditors. New boards of directors were subsequently elected for all of the KHC subsidiaries. *See* R.App.-12 for Amended Affidavit of David E. Hawthorne.

All of the creditors in Classes 1 through 6 under the Committees' Plan have either been paid in full or had their rights reinstated, thereby representing full satisfaction of those claims. Further, KHC distributed approximately $40 million in available cash to the Class 7 creditors and made their first interest payment, aggregating approximately $4.7 million, in respect of the notes issued to Class 7 creditors under the Committees' Plan. R.App.-16, 17. The Committees' Plan, thus, has been substantially consummated.

SUMMARY OF THE ARGUMENT

Judge McGuire complied with the plain terms of 28 U.S.C. § 455 when he immediately recused himself after learning that J.P. Morgan, a company in which he owned stock, was the corporate parent of Morgan Guaranty, one of the creditors in the Kendavis related bankruptcy proceedings pending before him.[5] The Fifth Circuit correctly held that when the facts of this case are applied to "well-settled principles of law,"[6] neither § 455(a) nor (b)(4) were violated. Section 455(b)(4) requires actual knowledge of a financial interest on the part of a judge. As found by both the District Court and the Fifth Circuit, this section is therefore inapplicable to Judge McGuire's prior rulings due to his total lack of knowledge of his financial interest in a creditor before him. Further, because of Judge McGuire's lack of knowledge, the Fifth Circuit correctly held that Judge McGuire's impartiality could not reasonably be questioned and therefore § 455(a) likewise requires no remedy under the facts of this case. The Fifth Circuit also properly found that the District Court did not abuse its discretion in denying discovery of Judge McGuire due to the absence of any allegations or affidavits of *actual* impropriety, bias or unfair treatment on the part of Judge McGuire. Because of the absence of such allegations or affidavits, the Fifth Circuit correctly rejected Petitioners' due process claim.

In addition, by failing to either file an objection to the Committees' Plan or otherwise appear in opposition to its

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[5] While the number of creditors in the KHC and KIII bankruptcy cases were relatively modest, the Kendavis related bankruptcy proceedings at the time of the confirmation hearings involved seven separate chapter 11 proceedings and thirteen separate involuntary bankruptcy proceedings aggregating in excess of 10,800 creditors.

[6] The Fifth Circuit's *per curiam* opinion was issued pursuant to its local rule 47.5 which provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." The Fifth Circuit opinion was not published.

confirmation, Petitioners have not preserved their right to appeal. Further, Petitioners are not "aggrieved" by the orders confirming the Committees' Plan since Petitioners' interests in an insolvent KHC are without value. R.App.-4. Accordingly, Petitioners have no direct pecuniary interest in these appeals and therefore lack standing to appeal.

Finally, the Committees' Plan has now been substantially consummated. Ownership of the debtor corporations has been transferred from the Petitioners, who are the former shareholders, to the creditors. All creditors with allowed claims, other than Class 7 creditors, have been paid in full. Reservations of cash have been made for creditors with contested claims so that if and when those claims are allowed, they will also be paid in full. Thus, any appeal of the Committees' Plan is now moot.

ARGUMENT

POINT I

JUDGE MCGUIRE RECUSED HIMSELF IN COMPLIANCE WITH 28 U.S.C. § 455 AND HIS ORDERS ARE THEREFORE VALID

Much of Petitioner's argument is dedicated to the notion that Judge McGuire should have been disqualified, prospectively. But the issue of whether § 455 required Judge McGuire's prospective recusal is not germane, since, as discussed below, Judge McGuire correctly recused himself. Rather, the question is whether almost three years and many million dollars of reorganization toil should be held for naught based merely on an alleged appearance of partiality when the courts below have each concluded that Judge McGuire clearly fulfilled the requirements of § 455, and where the Fifth Circuit has held that the Petitioners' substantive claims on appeal were frivolous.

a. **28 U.S.C. § 455(b)(4) does not require disqualification of a bankruptcy judge prior to the judge acquiring actual knowledge of his financial interest in a creditor in the proceeding.**

Section 455(b)(4) provides that a judge shall disqualify himself when "he knows that he . . . has a financial interest . . . in a party to the proceeding." 28 U.S.C. § 455(b)(4). This is a two part test applied uniformly among the circuits that requires "knowledge" of both a "financial interest" and the fact that the financial interest is "in a party to the proceeding." *See Davis v. Xerox*, 811 F.2d 1293, 1295 (9th Cir.), *cert. denied*, 56 U.S.L.W. 3383 (U.S. Nov. 30, 1987); *Hodosh v. Block Drug Co., Inc.*, 790 F.2d 880, 881 (Fed. Cir.), *cert. denied*, 107 S. Ct. 106 (1986); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986); *NEC Corp. v. Intel Corp.*, 654 F. Supp. 1256, 1257-58 (N.D. Cal. 1987), *appeal docketed*, No. 87-7126 (9th Cir. Mar. 30, 1987); *Catherines v. Copytele, Inc.*, 608 F. Supp. 1031, 1032 (E.D.N.Y. 1985); *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1081 (D. Ariz. 1981), *appeal dism'd*, 673 F.2d 1020 (9th Cir. 1982), *mand. denied*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for want of a quorum*, 459 U.S. 1191 (1983); *see also Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986), *cert. granted*, 107 S. Ct. 1368 (1987) (argued Dec. 9, 1987) (No. 86-957). The mere existence of a financial interest is not in and of itself disqualifying because a judge who is unaware that he has a financial interest in a party to a proceeding before him has no incentive to favor the party. *Union Carbide v. U.S. Cutting Service*, 782 F.2d at 714 ("Before [the judge] discovered she had a financial interest, she could have had no incentive to favor the plaintiffs; when she knew she had an interest, she made no rulings in the case . . .").

Generally, a judge who learns that he has a financial or other interest in a case is only required to recuse himself from future proceedings, following the discovery of such interest. *See Health Services*, 796 F.2d at 801; *In re Cement and*

Concrete Antitrust Litigation, 515 F. Supp. at 1081-82; 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3546 at 600 n.13 (1984). Only when the judge has had actual prior knowledge of an interest, and nevertheless proceeds to hear the case will his rulings be vacated under 455(b)(4).[7]

Petitioners' argument for the use of a "constructive knowledge" or "should have known" test in application of § 455(b)(4) is contrary to the plain reading of § 455(b)(4), the well-established principles of law uniformly followed among the circuits and the statute's legislative history.[8] In cases decided to date, no court has ever applied § 455(b)(4) to vacate orders of a judge that were issued before the judge actually learned of the relevant financial interest. *See Davis v. Xerox*, 811 F.2d at 1296; *Hodash v. Block Drugs*, 790 F.2d at 881; *Union Carbide v. U.S. Cutting Service*, 782 F.2d at 715; *NEC v. Intel*, 654 F. Supp. at 1259; *Catherines v. Copytele*, 608 F. Supp. at 1032; *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. at 1081.

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[7] *Compare Potaschnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.) *cert. denied*, 499 U.S. 820 (1980), which involved actual knowledge as required under 455(b)(5)(iii) *with Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980), which involved a *per se* violation of § 455(b)(3) where knowledge is *not* a statutory element. *See infra* at 12 n.12.

[8] Congress rejected the conclusive "presumption" of knowledge theory suggested by Petitioners when it failed to adopt Senate Bill 1886 introduced in 1971 by Senator Birch Bayh which provided that a judge shall disqualify himself "in *any case* in which he has an interest." Congress instead enacted Senate Bill 1064 introduced in 1973 by Senator Quentin N. Burdick which provided that a judge shall disqualify himself when "he *knows* that he, individually or as in fiduciary . . . has a financial interest . . . in a party to the proceeding." *Judicial Disqualification: Hearings on S. 1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 93rd Cong. 1st Sess. 1 (1973) (emphasis added) [hereinafter "*Senate Hearings*"] (Hearings held on July 14, 1971 and May 17, 1973 were reported in a single document with consecutive pagination). *Compare* S. 1886, Senate Hearings at 6-8 *with* S. 1064, Senate Hearings at 130-133. Senate Bill 1064 was supported by the American Bar Association and modeled after Canon 3C(1) of the Code of Judicial Conduct of the American Bar Association.

Accordingly, the orders of a disqualified judge entered before acquiring actual knowledge of an interest in a party remain valid orders. Judge McGuire, who did not have actual prior knowledge, has thus fulfilled the requirements of § 455(b)(4) by his prospective recusal, commencing when he first learned of the interest.[9] The Fifth Circuit correctly found that the District Court was entitled to accept Judge McGuire's statement of his lack of knowledge, and that the record does not justify questioning Judge McGuire's assurance.[10] Pet.App.-7.

Section 455(c) requires that a judge "inform himself about his personal and fiduciary financial interests." In these cases, Judge McGuire satisfied this section by inquiring early in the proceedings whether the interest he held in J.P. Morgan was connected to a bank creditor in these cases. He recalled being advised that there was no connection, and accordingly believed that there was none. Judge McGuire cannot be faulted for relying upon his broker. *Cf. Catherines v. Copytele, Inc.*, 608 F. Supp. at 1032 (trial judge looked first to the advise of his broker). As the District Court ruled, Judge McGuire thus had no reason for making further review of documents to determine whether any such relationship existed. Pet.App.-15.

The gravamen of Petitioners' position regarding § 455(c) and § 455(b)(4) is that, for purposes of determining whether *past* rulings should be undone, it is not enough for a judge to

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[9] There is support for the proposition that Judge McGuire could have continued hearing this case if he disposed of his stock upon acquiring actual knowledge of his interest in a creditor. *See The Advisory Committee on Codes of Conduct of the Judicial Conference of the United States (Oct. 15, 1981), Advisory Opinion* 69 [hereinafter *"Advisory Opinion"*] (concluding that disposing of disqualifying interest when it surfaces after the judge has been sitting on the case for some time would remove the disqualification and permit the judge to continue to sit). *Advisory Opinion* 69 was relied upon by *Union Carbide v. U.S. Cutting Service*, 782 F.2d at 715.

[10] All determinations relating to disqualification are reviewed under the abuse of discretion standard. *See, e.g., In re Placid Oil Co.*, 802 F.2d 783, 786 (5th Cir. 1986); *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984); *United States v. Gregory*, 656 F.2d 1132, 1136 (5th Cir. 1981).

make a reasonable inquiry of his financial interests; rather, the judge must successfully uncover every possible conflict, even in a case which involves thousands of creditors, many owned by holding companies or conglomerates.[11] According to Petitioners, if the already busy bankruptcy judge fails to actually uncover a latent conflict, the losing party should always have a new trial, even when the interest is not substantial. A rule along those lines would be unwieldy, inefficient and unfair, particularly in large banktuptcy cases. Indeed, such a rule would emasculate the "knowledge" requirement contained in § 455(b)(4).[12] In essence, Petitioners' reading of § 455(c) and § 455(b)(4) requires the judge to do the impossible — to recuse himself on the basis of facts that he does not know.

Further, Petitioners, who never reviewed Judge McGuire's financial disclosurers themselves, are in no position to question the scope or quality of his review. Because the ownership of J.P. Morgan stock was disclosed in the judge's financial reports of record and available to the public, why should Petitioners not be charged with this knowledge? And if "constructive knowledge" should be imputed to Judge McGuire because of securities filings, proxy statements or previously unobserved

[11] Recognizing that judges might unwittingly have a financial interest in a party to a proceeding before them, Congress concluded that in amending the statute, § 455 must have some reasonable standard of "knowledge." *See, e.g.*, colloquy of Senator Burdick and Senator Gurney during the testimony of John P. Frank. *Senate Hearings* at 38.

[12] It should be presumed that Congress acted intentionally and purposefully when it included the knowledge requirement in § 455(b)(4). *See Reiter v. Sonotone Corp.*, 442 U.S. 320, 339 (1979) ("In construing a statute [courts] are obliged to give effect, if possible, to every word Congress used"); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' . . . rather than to emasculate an entire section [citations omitted]."); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion"). *See supra* at 10 n.7.

portions of *Value Line*, why would it not also be imputed to Petitioners. And, if so, Petitioners have arguably long since waived any complaint. *Cf. Delesdernier v. Porterie*, 666 F.2d 116, 121-23 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982); *see also United States v. Murphy*, 768 F.2d 1518, 1540-41 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

b. **A bankruptcy judge's impartiality cannot reasonably be questioned within the meaning of 28 U.S.C. § 455(a) when he voluntarily recuses himself immediately upon acquiring actual knowledge of his financial interest in a creditor in the proceeding.**

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Rather than explicitly requiring knowledge, § 455(a) establishes an objective test that looks to whether "the reasonable man, were he to know all the circumstances would harbor doubts about the judge's impartiality." *Potaschnick*, 609 F.2d at 1111; *see e.g., New York Housing Development Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986); *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986); *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978). The District Court found below that a reasonable person would not harbor doubts about Judge McGuire's impartiality due to his prior lack of knowledge regarding the connection between Morgan Guaranty and J. P. Morgan. Pet.App.-15. The Fifth Circuit found it clear that Judge McGuire's impartiality could not reasonably be questioned. Pet.App.-7. Any "doubt" to the contrary would only be speculation, which will not support recusal. *Kinnear-Weed Corporation v. Humble Oil and Refining Co.*, 441 F.2d 631, 634-35 (5th Cir. 1971) *("Kinnear II"); see also Health Services*, 796 F.2d at 803; *Margoles v. Johns*, 660 F.2d 291, 298 (7th Cir.), *cert. denied*, 455 U.S. 909 (1982). To support reversal in these cases, a reasonable person knowing "all the circumstances" would have to speculate not only that Judge McGuire was not telling the truth in stating that he had no actual prior

knowledge of his financial interest after disclosing his discovery of such interest, but also that this reasonable person somehow knew more about Judge McGuire's knowledge than both the District Court and Fifth Circuit who reviewed the record and found no merit in Petitioners' claims.

Further, where as discussed above, only § 455(a) can have any application, the notion of substantial interest, unlike § 455(b)(4), is relevant in determining that Judge McGuire's insubstantial interest in J.P. Morgan would not cause a reasonable person knowing all the circumstances to question his impartiality. Here, Judge McGuire's 808 shares of J.P. Morgan constitute, according to affidavits submitted to the District Court, approximately .00023% of that company's outstanding capital stock. Pet.App.-16. The $27,000,000 claimed by Morgan Guaranty against KIII and KHC is approximately .036% of the reported assets of that company. The recoveries in these cases to bank claimants were estimated in the confirmation hearings to be in the range of 65%, realized over several years. These fractions show that a holder of such a minor interest, even with prior knowledge, could not have reasonably expected a noticeable financial enhancement in this case. Even in the unlikely scenario in which the subsidiary bank were to receive *no* recoveries in the case, Judge McGuire's holding could not be impacted even by two cents. The interest is thus so insubstantial, under any approach, that a reasonable person knowing all the circumstances would not question Judge McGuire's impartiality. Accordingly, over two years of hearings and rulings should not be vacated.

c. **28 U.S.C. § 455 does not contemplate vacating a judgment on appeal where the bankruptcy judge's rulings were made prior to his acquiring actual knowledge of his financial interest in a creditor in the proceeding.**

The Ninth Circuit, relying in part on *Health Services*, reasoned in *Davis v. Xerox*, 811 F.2d at 1296:

> The case is different, however, when the statute is not to be applied prospectively, but to be applied retro-

> spectively to rulings the judge has already made. In such retrospective applications we find wisdom in the observation of the Fifth Circuit interpreting Section 455(a): 'Because of the harsh consequences that can result, knowledge of fact should not lightly be imputed to a judge [*Health Services*, 796 F.2d at 803].' We are unwilling to presume that because the judge once knew, he could not have forgotten. The right course under § 455(b) as under § 455(a) is to proceed on a case by case basis, determining the existence of disqualifying knowledge at the time the judge sat, in the way that a state of mind is normally determined, from inspection of all the circumstances. If a reasonable person would conclude from all the circumstances that the judge did not have knowledge at the time he sat, his rulings stand. . .

In that case, the Ninth Circuit upheld the prior rulings of the trial court, reasoning on the facts of that case that a reasonable person would not harbor doubts about the trial judge's claim that he had forgotten about his financial interest. The views of the Seventh Circuit and Federal Circuit on the effect of recusal on prior rulings are expressed in *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (no judicial acts taken before a § 455(a) motion may be set aside); *New York Housing Development Corp. v. Hart*, 796 F.2d at 979; *Falconer v. Meehan*, 804 F.2d 72, 78 (7th Cir. 1986) and *Hodosh v. Block Drug Co.*, 790 F.2d at 881 (Fed. Cir. 1980) (refusing to vacate court of appeals decision where one of the panel judges did not know that his spouse owned stock in the parent company of a party to the appeal).

In *Health Services*, the Fifth Circuit granted retrospective disqualification under § 455(a), based upon a determination that the original trial judge had "constructive knowledge" of certain crucial facts. The District Court in these cases concluded, however, that the facts of *Health Services* are a "far cry" from the specific facts of the instant cases. Pet.App.-15. The two cases can be distinguished on a number of grounds.

First, the judge in *Health Services* knew of his interest very soon before the trial but forgot about his interest. Judge McGuire, on the other hand, never knew of the connection between Morgan Guaranty and J.P. Morgan until the night before he fully disclosed all the facts. Second, the judge in *Health Services* made no investigation of his interest at any time during that case, while Judge McGuire made a proper inquiry to his broker regarding the connection between Morgan Guaranty and J.P. Morgan but unwittingly operated under honestly mistaken advice. Third, the outcome of *Health Services* was found to be material to that judge's interest in the case, but as demonstrated above, the outcome of these cases could have no financial impact on Judge McGuire. Fourth, the judge in *Health Services* apparently did not make a timely disclosure to the parties, and later was unclear as to when actual knowledge had been obtained. Judge McGuire, on the other hand, made an immediate and full disclosure, which specified unequivocally *when* the knowledge was acquired. Fifth, the *Health Services* judge erred in failing to recuse himself, even after reacquiring actual knowledge of his interest. Judge McGuire, on the other hand, took immediate action when he first learned of a possible conflict. Finally, the trial judge in *Health Services* continued to hear substantive contested matters after reacquiring actual knowledge. Conversely, Judge McGuire ceased to hear any further matters on the first occasion of his obtaining actual knowledge. These differences alone would compel an informed "reasonable man" to a different conclusion about Judge McGuire than that reached concerning the *Health Services* judge. The Fifth Circuit found it "clear" that Judge McGuire's impartiality could not be reasonably questioned. Pet.App.-7.[13]

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[13] Other cases requiring retrospective recusal are also readily distinguishable. In *Potaschnick*, 609 F.2d 1101, the court was fully aware of the conflict prior to hearing the case, and advised the parties of the conflict, but proceeded to try the case on the premise of consent. In *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983), the magistrate's law clerk had accepted employment with the firm representing one of the parties to a class action lawsuit. The magistrate did not immediately take the law clerk off all work on the case, even though *aware* of the clerk's prospective employment.

As illuminated in *Davis v. Xerox*, 811 F.2d at 1296, the *Health Services* opinion notes that knowledge should *not* lightly be imputed to a judge. The overly broad expansion of the "constructive knowledge" test urged by Petitioners is inappropriate. Moreover, "[w]here a reasonable man would only speculate that a judge might have actual knowledge of the facts, constructive knowledge does not exist." *Health Services*, 796 F.2d at 803. The Respondent Committees submit that the *Murphy* rule denying retrospective relief absent actual impropriety is the correct analysis of § 455(a). But as discussed above, under the specific facts of this case, the Fifth Circuit's ruling is not inconsistent with its own prior ruling in *Health Services* or the rulings of any other court. Accordingly, this case does not merit this Court's review.[14]

d. The confirmation related orders satisfy due process and are therefore not void.

"A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction . . . or or if it acted in a manner inconsistent with due process of law." 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2862 (1973). Not all questions of judicial qualification, however, involve constitutional validity. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (*citing Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). Due process is violated when a person's liberty or property is subjected to a "judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 475 U.S. at 821-22 (*citing Tumey*, 273 U.S. at 523). What constitutes a "direct, personal, substantial, pecu-

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[14] Respondent Committees submit that under the specific facts of this case, the circuit courts are in accord that no retrospective application of § 455 is warranted. To the extent there is a conflict between the Seventh and Fifth Circuits concerning when retrospective application of § 455 is appropriate, that conflict will likely be resolved by this Court in *Health Services*, *supra*. That decision, however, is not necessary to the case at bar.

niary interest' has been formulated by this Court to be a situation

> which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true . . .

Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (*cited with approval* in *Lavoie, supra* at 822).

In applying the above constitutional standard to the specific facts of this case, it is clear that Judge McGuire's indirect interest in Morgan Guaranty did not constitute a "direct, personal, substantial, pecuniary interest" in the outcome of the Kendavis bankruptcy proceedings. Moreover, the Fifth Circuit in determining that there was no violation of 28 U.S.C. § 455, ruled it is clear that Judge McGuire's impartiality could not reasonably be questioned.

Because Petitioners have failed to establish any violation of § 455, they consequently fail in their efforts to establish a violation of fifth amendment due process. *See United States v. International Business Machines,* 475 F. Supp. 1372, 1390 (S.D.N.Y. 1979), *aff'd,* 618 F.2d 923, 932 n.11 (2d Cir. 1980). "It would be anomalous to hold a claim under the statutes [28 U.S.C. §§ 144, 455] insufficient on its merits could nevertheless satisfy the constitutional standard." *Id.* at 932 n.11. *See also* Pet.App.-16. If a claim of bias and prejudice passes the rigid scrutiny of § 455, it will necessarily pass constitutional muster as well. *International Business Machines,* 475 F. Supp. at 932 n.11.

e. **The District Court did not err in denying discovery of Judge McGuire.**

Petitioners' assertion that they were entitled to discovery, including the deposition of Judge McGuire, constitutes a mere ruse for delay.[15] The vast majority of disqualification cases have

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[15] The Fifth Circuit correctly noted that orders have been entered by the successor bankruptcy judge in these cases and steps have been taken by the successor corporation implementing the Committees' Plan. An evidentiary hearing would only add needless expense and delay the necessary continued implementation of the Committees' Plan. Pet. App.-7.

wisely been determined solely on the strength of statements or letters by the trial court, without any depositions or cross-examination of judges. In *Hunt v. Mobil Oil Corporation*, 654 F. Supp. 1487, 1495-96 (S.D.N.Y. 1987) (*citing Andros Compania Maritime, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 701 (2d Cir. 1978)), a case in which motions to depose a Title 9 arbitrator and to vacate awards were denied, Judge Edward Weinfeld Wrote:

> To invoke the discovery and deposition process in a search for evidence to support the charges would be tantamount to requiring a judge to submit to an oral deposition by a non-prevailing party where the judge had refused to recuse himself on allegations of personal bias under 28 U.S.C. § 455.
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> [T]he Court [Second Circuit] made it clear that the [discovery] procedure should be invoked only under judicial supervision *and 'limited to situations where clear evidence of impropriety has been presented.'* [citing *Andros*]. The instant case clearly is not such a situation; on the contrary, it is an attempt to use, more correctly abuse, the discovery process as a fishing expedition which would needlessly delay the proceeding. *Post-verdict examinations of a judicial or quasi-judicial officer, be he judge, juror, or arbitrator, for the purpose of impeaching his decision are 'inherently suspect, indeed, roundly condemned, in our system of jurisprudence.'*

654 F. Supp. at 1495 n.13 (citations omitted) (emphasis added).

If depositions of judges are to be permitted in any case, "clear evidence of impropriety" should first be demonstrated in order to prevent abuse. In *Ricci v. Key Bancshares of Maine*,

Inc., 111 F.R.D. 369, 373 n.4 (D. Me. 1986), a case in which the request to depose the judge was denied, the court opined:

> [A] motion to recuse is not a mere pleading, a first step towards a possible case. Like any public official, a judge is presumed qualified to act, and an objector must come with a prima facie case, not just a hope of developing one.

The instant case involves no hint or allegation, and certainly no affidavit of prior actual knowledge, or any other *per se* violation or actual impropriety. Even when allegations of actual knowledge or impropriety are advanced however, the attempts by a losing litigant to depose the trial judge should be subject to stringent judicial control and discretion, in order to protect the courts and public against trivial and vexatious litigation.

But, particularly as in these cases where only "constructive knowledge" can even be colorably alleged, the movant should be required at the outset to articulate and substantiate, by affidavit where appropriate, a rational basis for the imputation of "constructive knowledge" before proceeding further. It should be remembered that "Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations," and that courts "should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rights for litigious advantage." *Delesdernier*, 666 F.2d at 121. The record is adequate for a reasonable person to conclude that Petitioners did not meet their threshold of proof necessary to depose Judge McGuire. The Fifth Circuit properly found that the District Court did not abuse its discretion in rejecting the drastic remedy of vacating all of Judge McGuire's

rulings and refusing to set the dangerous precedent of allowing his deposition.[16]

f. **Public policy disfavors a retrospective remedy in these cases.**

Petitioners hope to persuade this Court that public confidence in the judicial system will be enhanced by vacating the orders below because of an imagined appearance of partiality by Judge McGuire.[17] The public interest in judicial purity is not undercut, however, where the judge's financial interest is disclosed by the trial court immediately upon first learning of an interest. Unless substantive, non-speculative contradictions to the reasonable observer are apparent from affidavits or publicly available documents, the public and the judiciary would be ill-served by any process that undoes sound determinations or permits vexatious fishing expeditions to be commenced by a losing litigant against the trial judge.

Further, today's bankruptcy judges hear cases in which there are tens of thousands of creditors. The goals of § 455 are

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[16] A judge's decision to deny recusal motions without formal hearings is subject to the "clear abuse" rule. *United States Fidelity & Guaranty Co. v. Lawrenson*, 34 F.R.D. 121, 123 (D.Md.) *aff'd*, 334 F.2d 464 (4th Cir. 1964), *cert. denied*, 379 U.S. 869 (1964); *Harris v. Illinois-California Express, Inc.*, 687 F.2d 1361, 1374 (10th Cir. 1982); *cf.* Bankruptcy Rule 8011. For application of the clear abuse standard to matters under Fed. R. Civ. P. 59 or 60(b) *see Adams v. Johns-Manville Sales Corp.*, 727 F.2d 533, 539 (5th Cir. 1984); *In re Ta Chi Navigation (Panama) Corp.* 728 F.2d 699, 703 (5th Cir. 1984); *Verret v. Elliot Equipment Corp.*, 734 F.2d 235 (5th Cir. 1984); *Goldman v. Tesoro Drillling Corp.*, 700 F.2d 249, 251 (5th Cir. 1983); *Alvestad v. Monsanto Co.*, 671 F.2d 908, 912 (5th Cir.), *cert. denied*, 459 U.S. 1070 (1982) and *Union Mechling Corp. v. Carmadelle*, 624 F.2d 677, 679 (5th Cir. 1980). The exception to this rule respecting judgments void *ab initio* does not apply where, as here, only 28 U.S.C. § 455(a) has any relevance to the allegations. *Compare Recreational Properties, Inc. v. Southwest Mortgage Service Corp.*, 804 F.2d 311, 313 (5th Cir. 1986).

[17] No personal rights arise under § 455(a); *cf. Health Services*, 796 F.2d at 800; *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *Kinnear-Weed Corporation v. Humble Oil and Refining Company*, 403 F.2d 437, 439-40 (5th Cir. 1968), *cert. denied*, 404 U.S. 941 (1971). *But see Murphy*, 768 F.2d at 1539-40.

satisfied by requiring a judge who discovers that he has any interest in any creditor to recuse himself prospectively. It would be impractical and inequitable to adopt the remedy suggested by Petitioners that all orders and judgments should be null and void simply because appearances of partiality are alleged. The public interest at stake in bankruptcy cases of prompt, responsible and timely reorganization for the benefit of creditors cannot be ignored. *See In re Timbers of Inwood Forest Associated, Ltd.*, 808 F.2d 363, 373-74 (5th Cir. 1987) (Clark, F. J., concurring), *cert. granted*, 107 S. Ct. 2459 (1987) ("Reorganization is not a Holy Grail to be pursued at any length. Creditors are entitled to a prompt determination of efficacy").

Under the facts of this case, in determining whether a retrospective remedy should be applied, concern about real injustice to the successful litigant, forced to delay or even surrender his decree or judgment and begin again, should on balance outweigh concern about Petitioners' speculation as to an appearance of impartiality. To hold otherwise in this case would result in a windfall in favor of parties who are not even "aggrieved" by the judgment. *See infra.* The rule promoted by Petitioners will do nothing more than encourage losing parties in litigation, even those with "frivolous" claims, to regard § 455 as another strategy for attacking judgments, increase the number of challenges to federal judges and make judgments subject to reconsideration by invoking what a hypothetical unreasonable man might think. *See Delesdernier*, 666 F.2d at 121; *cf. Advisory Opinion* No. 69, *supra.*

POINT II

PETITIONERS HAVE NO STANDING TO APPEAL

The District Court dismissed the appeals of the Committees' Plan because the appellants (including Petitioners herein) lacked standing. The requirements of standing goes to the subject matter jurisdiction of the Court to hear Petitioners' appeal. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541-49 (1986); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 488 (1982). The Fifth Circuit affirmed the confirmation orders on the merits without ruling on the issue of standing.

Under existing bankruptcy case law, Petitioners have standing to challenge only those parts of the reorganization plan that affect their direct interest. *See e.g., In re Johns-Manville Corporation*, 68 B.R. 618, 623 (Bankr. S.D.N.Y. 1986); *In re Evans Products Co.*, 65 B.R. 870, 874 (S.D. Fla. 1986); *In re Sweetwater*, 57 B.R. 743, 746 (D. Utah 1985). To have standing to appeal, Petitioners must be aggrieved persons, directly, adversely, and pecuniarily affected by the orders of the Bankruptcy Court. *See, e.g., Sweetwater*, 57 B.R. at 746; *Holywell Corporation v. Bank of New York*, 59 B.R. 340, 349-50 (S.D. Fla. 1986).

The District Court correctly determined that Petitioners were not aggrieved persons. Prior to the Committees' Plan, KHC and KIII were insolvent. This insolvency, admitted repeatedly during the confirmation hearings, was an insurmountable threshold that denied standing to the former shareholders to assert any other issue on appeal. *See In re Evans Products Co.*, 65 B.R. at 874. The District Court thus appropriately ruled that the former shareholders were not aggrieved persons and were without standing to appeal the confirmation of the Committees' Plan.

K. W. Davis, Jr., Kay Davis and Twalla Dupriest, as bankruptcy trustee for the estate of T. C. Davis, hold Class 6 claims. They each had notice of and an opportunity to object to the Committees' Plan and appear in opposition to its confirmation. But, because not a single member of the Davis family filed such an objection to the Committees' Plan or appeared at the confirmation hearing in opposition to the Committees' Plan, the District Court correctly held that these persons failed to preserve their right to appeal. Accordingly, none of the Davis family has a right to be heard for the first time on appeal. *Id.* Moreover, the Class 6 claims have now been paid in full. Petitioners thus are not aggrieved at all in their capacity as Class 6 creditors. For these same reasons, the Petitioners lack standing to seek a retrospective remedy under 28 U.S.C. § 455. They can no more seek a retrospective remedy than could a total stranger to the case.

POINT III

THE COMMITTEES' PLAN HAS BEEN SUBSTANTIALLY CONSUMMATED THEREBY RENDERING PETITIONER'S APPEAL MOOT

On April 16, 1987, in accordance with the self executing provisions of the Committees' Plan, the prior capital stock of KHC was cancelled, KIII was statutorily merged into KHC, a new board of directors and chief executive officer were installed, and new capital stock was issued to the Class 7 creditors. New boards of directors were subsequently elected for all of the KHC subsidiaries. Thereafter, all of the creditors in Classes 1 through 6 under the Committees' Plan were either paid in full or had their rights reinstated, thereby representing full satisfaction of those claims. Further, KHC distributed approximately $40 million in available cash to the Class 7 creditors and made their interest payment aggregating approximately $4.7 million in respect to the notes issued to Class 7

creditors under the Committees' Plan. At no point during the course of the appeal of the confirmation order did Petitioners seek a stay of implementation of the Committees' Plan except for Petitioners' unsuccessful efforts to abate the payment in full of all Class 6 claims.

Federal courts may not resolve questions posited in a vacuum but only those arising in a "case or controversy." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937). In that case the Court stated:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

Id. at 240. Claims of mootness are controlled by the principles enunciated in *Mills v. Green*, 159 U.S. 651, 653 (1895):

> [W]hen, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

The mootness doctrine has been uniformly recognized by the circuit courts in the context of bankruptcy appeals from orders of confirmation. In that context, the "doctrine promotes an important policy of bankruptcy law — that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *See In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Thus, when a plan of reorganization has been so substantially consummated that effective relief is no longer available, an appeal is moot and should be dismissed, leaving the order of confirmation and the plan of reorganization as the operative

instruments determining rights among creditors, as well as ownership and management of the company. *See, e.g., id.; Miami Center Ltd. Partnership v. Bank of New York*, 820 F.2d 376, 379 (11th Cir. 1987), *modified on other grounds*, 826 F. 2d 1010 (1987); *In re AOV Industries, Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *In re Sun Country Development, Inc.*, 764 F.2d 406, 407 n.1 (5th Cir. 1985); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 187, 194 (9th Cir. 1977).

The above facts demonstrate and Petitioners admit in pleadings filed in related proceedings below, that the Committees' Plan has been substantially consummated.[18] Ownership of the corporations has been transferred from the Petitioners, who are the former shareholders, to the creditors. All creditors, with allowed claims, other than Class 7, have been paid in full. Reservations of cash have been made for creditors with contested claims so that if and when those claims are allowed, they will also be paid in full. As the Fifth Circuit aptly stated: "Former stockholders in an insolvent debtor corporation and former management of that corporation, claiming rights or representation of creditors that can now be fully paid, want to vacate a plan of reorganization that has been substantially implemented." Pet. App.-6, 7. Even if this Court were to grant Petitioners' writ of certiorari and decide the case in favor of Petitioners, it would therefore be virtually impossible at this juncture to grant any effective relief. As a result, this appeal is moot and does not present a justiciable controversy.

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[18] *See* Brief of Appellants, *In re: Kendavis Holding Co., et al.*, CA No. 3-87-2561-G (U.S.D.C., N.D. Texas) filed Nov. 17, 1987 and Emergency Application for Writ Pursuant to 28 U.S.C. § 1651(a) and Supporting Brief, *In re: Kendavis Holding Co., et al.*, No. 87-1687 (5th Cir.) filed September 11, 1987.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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